Petra Pek Chong Le @ Nur Shafiqah v Director of Jabatan Agama Islam Sarawak & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–152/10 OF 2013
RHODZARIAH BUJANG J
20 JANUARY 2014

Civil Procedure — Originating summons — Procedure by — Conversion out of Islam — Application to change Muslim name and religion in identity card — Applicant sought reliefs that she be declared Christian — Order of mandamus to compel issuance of letter of release from Islam — Order of mandamus be issued to compel change of Muslim name back to Christian name and present religion

Islamic Law — Conversion — Conversion out of Islam — Application to change Muslim name and religion in identity card — Requirement of letter of release from Islam before application could be considered — No reply received from National Registration Department — Filing of originating summons

The plaintiff, of mixed Chinese and Murut parentage originally from Lawas, Sarawak was raised as a Christian by her parents but converted to the Islamic faith in June 2003 when she married a Muslim man, and the conversion was done by the Religious Department of Sabah. Her identity card issued by the National Registration Department ('NRD') contained her new Muslim name and religion. The plaintiff claimed to have been abandoned by her Muslim husband and she had since, not only returned to her Christian faith but also married a Nigerian man in Singapore and had a daughter born out of wedlock with him. The plaintiff had applied to change her Muslim name and religion in her identity card but was rejected by the third defendant. She was advised by the NRD to first secure a letter of release from Islam before her application could be considered. She had written a letter to the first and second defendants for that letter of release but having not received any reply from them, she filed this originating summons for the reliefs that she be declared a Christian; an order of mandamus be issued to compel the first and second defendant to issue the letter of release from Islam; an order of mandamus be issued to compel the third defendant to change her Muslim name back to her original name and her present religion.

Held, striking out the application:

(1) It is trite law that prerogative writs must be applied by way of judicial review and that an order of mandamus was one of such writs. In a judicial

review application, besides the prayers compelling the authority named to act, it could also include a declaratory order and that there were quite stringent procedural requirements enacted in O 53 of the Rules of Court 2012 ('ROC') on judicial review; the first of which was the requirement on leave. The plaintiff in this case had applied for both types of prayers but elected not to commence her action by judicial review but by this originating summons (see para 4).

(2) It would be grossly unjust to restrict the plaintiff to a judicial review application because it was not disputed that the third defendant did not make any decision on her request for the letter of release from Islam made in her letter, rendering her helpless to comply with O 53 r 3(6) since there was no starting date to kick start O 53 r 3(6) which provided that an application for judicial review must be made within three months from the date of the decision of the public authority which gave rise to the application or when it was communicated to her. Although that three months period could be extended, nevertheless, when no decision had been made by the public authority, restricting the plaintiff to the judicial review provisions in the Rules of Court 2012 would be a gross and grave injustice (see para 8).

(3) The High Court in Kuching or Sarawak was not seized with the jurisdiction to grant the prayers sought for since the conversion was registered in Sabah. The religion of Islam was under the State List in the Ninth Schedule to Federal Constitution with the practical effect that each state administers their own law pertaining it. Thus, the administration of Islam in Sabah by its religious authorities were distinct and separate from that of Sarawak. Although the plaintiff was a Sarawakian, her conversion was in Sabah and her certificate of conversion was issued by them. Otherwise, that part of the administration of the religion would be in a mess where non-Muslims would convert in one State and renounce the religion in another (see para 9).

[Bahasa Malaysia summary

Plaintif, seorang yang berketurunan campuran Cina dan Murut yang berasal dari Lawas, Sarawak dibesarkan sebagai seorang Kristian oleh ibu bapanya tetapi memeluk agama Islam pada Jun 2003 apabila dia berkahwin dengan lelaki Muslim, dan penukaran agama tersebut dilakukan oleh Jabatan Agama Sabah. Kad pengenalannya dikeluarkan oleh Jabatan Pendaftaran Negara ('JPN') mengandungi nama Muslim dan agama barunya. Plaintif mendakwa telah ditinggalkan oleh suami Muslimnya dan dia telah bukan sahaja kembali kepada agama Kristian tetapi juga telah berkahwin dengan lelaki Nigeria di Singapura dan mempunyai anak luar nikah dengannya. Plaintif memohon untuk menukar nama Muslimnya dan agama di dalam kad pengenalannya tetapi ditolak oleh defendan ketiga. Dia dinasihatkan oleh JPN untuk mendapatkan dahulu surat pelepasan daripada Islam sebelum permohonannya

boleh dipertimbangkan. Dia telah menulis surat kepada defendan-defendan pertama dan kedua untuk surat pelepasan tersebut tetapi tidak menerima apa-apa jawapan daripada mereka, dia memfailkan saman pemula ini untuk relief bahawa dia diisytiharkan seorang Kristian; perintah mandamus dikeluarkan untuk memaksa defendan-defendan pertama dan kedua untuk mengeluarkan surat pelepasan daripada Islam; perintah mandamus dikeluarkan untuk memaksa defendan ketiga menukarkan nama Muslimnya semula kepada nama asalnya dan agama sekarangnya.

Diputuskan, membatalkan permohonan:

(1) Adalah undang-undang nyata bahawa writ prerogatif mesti dipohon melalui semakan kehakiman dan bahawa perintah mandamus adalah salah satu writ sedemikian. Dalam permohonan semakan kehakiman, selain permohonan memaksa pihak berkuasa untuk bertindak, ia juga boleh memasukkan perintah perisytiharan dan bahawa terdapat keperluan prosedur agak ketat digubal di dalam A 53 Kaedah-Kaedah Mahkamah 2012 ('KM') mengenai semakan kehakiman; keperluan yang pertama adalah keperluan mengenai keizinan. Plaintif dalam kes ini telah memohon untuk kedua-dua jenis permohonan tetapi memilih untuk tidak memulakan tindakannya melalui semakan kehakiman tetapi melalui saman pemula (lihat perenggan 4).

(2) Ia akan menjadi terlalu tidak adil untuk menyekat plaintif kepada permohonan semakan kehakiman kerana tidak dipertikaikan bahawa defendan ketiga tidak membuat apa-apa keputusan atas permohonannya untuk surat pelepasan daripada Islam dibuat di dalam suratnya, menyebabkan dia tidak berdaya untuk mematuhi A 53 k 3(6) memandangkan tidak terdapat tarikh permulaan untuk membangkitkan A 53 k 3(6) yang memperuntukkan bahawa permohonan untuk semakan kehakiman mesti dibuat dalam masa tiga bulan dari tarikh keputusan pihak berkuasa awam yang membangkitkan kepada permohonan atau apabila ia diberitahu kepada perayu. Walaupun tempoh tiga bulan boleh dilanjutkan, namun begitu, apabila tiada keputusan dibuat oleh pihak berkuasa awam, menyekat plaintif kepada peruntukan semakan kehakiman di dalam Kaedah-Kaedah Mahkamah 2012 adalah terlalu tidak adil (lihat perenggan 8).

(3) Mahkamah Tinggi Kuching atau Sarawak tidak mempunyai bidang kuasa untuk memberi permohonan-permohonan yang dipohon memandangkan penukaran agama tersebut didaftarkan di Sabah. Agama Islam adalah di bawah Senarai Negeri di dalam Jadual Kesembilan Perlembagaan Persekutuan dengan amalan praktikal bahawa setiap negeri mentadbirkan sendiri undang-undang Islam berkaitan perkara tersebut. Oleh itu, pentadbiran agama Islam di Sabah oleh pihak berkuasa agama adalah berbeza dan berasingan daripada pentadbiran di

Sarawak. Walaupun plaintif penduduk Sarawak, penukaran agamanya adalah di Sabah dan sijil penukaran agama dikeluarkan oleh negeri Sabah. Jika tidak, bahagian pentadbiran agama tersebut akan berada dalam keadaan kucar-kacir di mana seorang bukan Muslim akan menukar agama di dalam satu negeri dan meninggalkan agama di negeri lain (lihat perenggan).]

Notes

For a case on conversion out of Islam, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 598.

For cases on procedure by originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5819–5824.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan and Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Lina Joy v Majlis Agama Islam Wilayah & Anor [2004] 2 MLJ 119, HC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah persekutan dan lain-lain [2007] 4 MLJ 585, FC (refd)

O'Reily v Mackman [1983] 2 AC 237, HL (refd)

Legislation referred to

Federal Constitution Ninth Schedule State List
Rules of Court 2012 O 53, O 53 rr 1(2), 3(6)
Specific Relief Act 1950 ss 44, 45, 49

Chua Kuan Ching (Baru Bian Advocates) for the plaintiff.
Saferi Ali (Mohd Azrul with him) (State Attorney General's Chambers) for the defendant.

Rhodzariah Bujang J:

RULING

[1] The plaintiff, of mixed Chinese and Murut parentage originally from Lawas, Sarawak was raised as a Christian by her parents. She converted to the Islamic faith in June 2003 when she married a Muslim man. That conversion was done by the Religious Department of Sabah as evidenced by a conversion certificate issued by them dated 22 December 2003. Her identity card issued by the National Registration Department contained her new Muslim name and religion. The plaintiff claimed to have been abandoned by her Muslim husband and she has since, not only returned to her Christian faith but also married a Nigerian man in Singapore on 12 March 2012 and has a daughter born out of wedlock with him.

[2] The plaintiff has applied to change her Muslim name and religion in her identity card but was rejected by the third defendant ('Director General of National Registration Department'). She has been advised by the National Registration Department to first secure a letter of release from Islam before her application can be considered. She has written a letter to the Director of Jabatan Agama Islam Sarawak ('first defendant') and Majlis Agama Islam Sarawak ('second defendant') for that letter of release but having not received any reply from them, she has filed this originating summons for the following reliefs:

(a) that she be declared a Christian;

(b) that an order of mandamus be issued to compel the first and second defendant to issue the letter of release from Islam; and

(c) that an order of mandamus be issued to compel the third defendant to change her Muslim name back to her original name and her present religion.

[3] The first, second and fourth defendants have applied to strike out the originating summons on the ground of procedural irregularity and absence of jurisdiction. The third defendant's counsel, Mr Mohd Taufik bin Mohd @ Mohd Yusoff adopts and supports the application as well as the submission of Mr Saferi Ali, for the state authorities named as the other defendants in this case.

PROCEDURAL IRREGULARITY

[4] It is trite law that prerogative writs are applied for by way of judicial review and that an order of mandamus is one of such writs. It is also equally clear that in a judicial review application, besides the prayers compelling the authority named to act, it can also include a declaratory order and that there are quite stringent procedural requirements enacted in O 53 of the Rules of Court 2012 on judicial review; the first of which is the five requirement on leave. The plaintiff in this case has applied for both types of prayers but has elected not to commence her action by judicial review but by this originating summons. The wrong procedure has been adopted, said Mr Saferi AN and for which the originating summons must be struck out in limine.

MANDAMUS UNDER THE SPECIFIC RELIEF ACT 1950

[5] Ms Chua Kuan Ching, for the plaintiff, in her detailed written submission was at pains to point out to me that the relief of mandamus prayed by her client under s 44 of the Specific Relief Act 1950 (which appears in the intitulement of the action) is distinguishable from that of a mandamus under O 53 of the Rules of Court 2012. With due respect to her diligent research and

reasoning, I am unable to accede to that submission for the simple reason that s 45 of the said act which provides on how the application for mandamus should be made and its procedure did not say by what *mode* such an action should be commenced. In the absence of a stipulated method for commencing the action, a plaintiff such as her client has to look to the Rules of Court 2012 for guidance and when I examined O 53, the position and correlation between the substantive law which is the said Act and the procedural law, which is the Rules of Court 2012 is made even clearer when O 53 r 1(2) specifically provides as follows:

> This Order is subject to the provisions of *Chapter VIII of Part 2 of the Specific Relief Act 1950 (Act 137)*. (Emphasis added.)

[6] Chapter VIII, for the record, is on 'Enforcement of Public Duties' which is mandamus and it starts with s 44 and concludes with s 49. Thus, the plaintiff is strictured by O 53 in commencing her action. Saying this by no means would resolve this issue. Ms Chua Kuan Ching has another salvo to fire. She argued that her client is exempted from filing this action under O 53.

EXCEPTION TO JUDICIAL REVIEW

[7] Mr Saferi Ali has highlighted to me the celebrated Federal Court case on judicial review, *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan and Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865 where James Foong FCJ advised as follows:

> We observe that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantiative principles of public law then the appropriate process should be by way of O 53 of the Rules of High Court. If there is a mixture of public and private law then the Court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 of the Rules of High Court must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. *But if the matter is under private law, though concerning a public authority, the mode to commence action under O 53 of the Rules of High Court is not suitable.* (Emphasis added.)

[8] Ms Chuan Kuan Ching for the plaintiff denied that her client is bound by the said procedure because of the predominance of the private law content in her client's case. I do not think that her argument is misplaced. It is apparent enough that religion is a very personal matter, unlike five dismissal of an employee in a public sector as in *Ahmad Jefri*'s case. Besides, except for the requirement on leave and the set timelines in O 53, the resolution of a dispute filed by originating summons and judicial review are both by way of affidavit

evidence, unlike that of a writ action where it is by way of trial with witnesses. What is more, in the facts of this case, it would be grossly unjust to restrict the plaintiff to a judicial review application because it is not disputed that the third defendant did not make any decision on her request for the letter of release from Islam made in her letter dated 15 August 2013 (exh 'PP14' to her affidavit affirmed on 7 October 2013), rendering her helpless to comply with O 53 r 3 (6) since there is no starting date to kick start O 53 r 3(6) of the Rules of Court 2012 which provides that an application for judicial review must be made within three months from the date of the decision of the public authority which gives rise to the application or when it was communicated to her. Although that three months period could be extended, nevertheless, when no decision is made by the public authority, I reiterate that restricting this plaintiff to the judicial review provisions in the Rules of Court 2012 would be a gross and grave injustice. Thus, in my view, this issue of the plaintiff's reconversion is yet another exception to the principle established in *O'Reily v Mackman* [1983] 2 AC 237 which requires that a challenge to a public authority's decision on an alleged infringement of a person's right which is protected by public law to be by way judicial review. The Law Lords in the said case has left open the exception to this strict rule when they said at the same p 285 that whether there should be other exception should, at that stage in the development of procedural public law, be left to be decided on a case to case basis. Furthermore, I also note Ms Chua Kuan Ching's submission that the celebrated case of *Lina Joy v Majlis Agama Islam Wilayah persekutan dan lain-lain Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 which appeal went all the way to the Federal Court (see the decision as reported in [2007] 4 MLJ 585) on the like issue of leaving Islam was also commenced by way of an originating summons and not by judicial review.

WANT OF JURISDICTION

[9] On this issue, I simply have no choice but to agree with the defendants that the High Court in Kuching or Sarawak for that matter is not seized with the jurisdiction to grant the prayers sought for since the conversion was registered in Sabah. My reason for saying so is because the religion of Islam is under the State List in the Ninth Schedule of the Federal Constitution with the practical effect that each state administers their own law pertaining it. Thus, the administration of Islam in Sabah by its religious authorities are distinct and separate from that of Sarawak. Although the plaintiff is a Sarawakian, her conversion was in Sabah and her certificate of conversion was issued by them. If I agree to make the orders prayed for by the plaintiff, I would be acting in vain as the certificate of conversion kept by the Sabah Islamic authority would still be on their register and the orders if made would, since it was not directed to the said authority, be an act of futility. The orders might even be laughed at for being absurd. Thus, I could not, in view of the separation of powers between

the states, on the administration of Islam, issue a mandamus to the Sarawak religious authorities pertaining to her release from Islam, when as rightly submitted by Mr Saferi Ali, her certification as a Muslim is registered and kept by the Sabah religious authorities. Otherwise, that part of the administration of the religion would be in a mess where non-Muslims would convert in one state and renounce the religion in another.

[10] Accordingly, I would agree to strike out the plaintiff's originating summons as to allow it to remain would be an abuse of the court's process but with liberty to file afresh in the High Court in Sabah. Additionally, I order the plaintiff to pay cost of the application in the sum of RM1,000 as agreed by the parties.

Application struck out.

Reported by Afiq Mohamad Noor